

No. 81160-1

SUPREME COURT OF THE STATE OF WASHINGTON

CORNHUSKER CASUALTY INSURANCE
COMPANY,

Plaintiff - Appellee,

v.

CHRIS KACHMAN and DEBBIE KACHMAN, husband and wife; ROCKERIES INC.,
a Washington corporation; and BROOKS SAMPLES, individually and as Personal
Representative of the Estate of Leanne Samples,

Defendants - Appellants

CERTIFICATION FROM THE UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT
NO. -06-35106

APPELLANT SAMPLES' RESPONSE TO PCIAA'S AMICUS BRIEF

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I. INTRODUCTION

The Property Casualty Insurers Association of America's (PCIAA) amicus brief simply rehashes arguments already made by Respondent Cornhusker Casualty Insurance Company. PCIAA's amicus brief is notable more for what it ignores than for what it adds to this case.

II. ARGUMENT

A. PCIAA ignores the fact that the Ninth Circuit found RCW 48.18.290 to be ambiguous.

PCIAA argues that RCW 48.18.290 is not ambiguous because it cannot be reasonably interpreted in more than one way. *PCIAA Brief* at pp.3-4. The Ninth Circuit would not have certified this case to be decided by this Court if the statute were unambiguous as argued by PCIAA. The Ninth Circuit clearly found that the statute can be reasonably interpreted in more than one way and is therefore ambiguous:

- “Even though the statute no longer includes the words ‘actually delivered’ it still distinguishes between delivering and mailing a notice of cancellation without either defining mail to include certified mail or instead requiring delivery of certified mail.” *Order Certifying Question* at p.1519, fn. 2.
- “[I]n five other sections of the Revised Code of Washington (‘RCW’) ‘mail’ is defined to mean only ‘regular mail,’ and no section of the RCW defines the term to include certified mail.” *Order Certifying Question* at p.1520.
- “The silence of RCW § 48.18.290 with respect to certified mail in light of the other Washington statutes that explicitly authorize its

use might possibly indicate a deliberate choice by the Washington State Legislature, and '[w]here the Legislature omits language from a statute, intentionally or inadvertently, . . . [a reviewing] court will not read into the statute the language that it believes was omitted. *State v. Moses*, 37 P.3d 1216, 1218 (Wash. 2002)." *Order Certifying Question* at p.1521.

- "Our uncertainty regarding the role of certified mail under RCW § 48.18.290 is heightened by the public policy considerations that underlie insurance regulations and the Washington State Supreme Court's holding that such policy considerations must be considered when interpreting statutes that regulate insurance policies." (citing *Olivine Corp v. United Capitol Ins. Co.*, 52 P.3d 494, 501 (Wash. 2002) and *Arborwood Idaho, L.L.C. v. City of Kennewick*, 89 P.2d 217, 221 (Wash. 2004)). *Order Certifying Question* at p.1523.

RCW 48.18.290 is clearly susceptible to more than one reasonable interpretation and is therefore ambiguous.

B. When interpreting an ambiguous statute, the Court must consider and give effect to the Legislature's intent.

PCIAA completely ignores the legislative intent underlying RCW 48.18.290 – "to provide the insured the opportunity to obtain other insurance prior to cancellation." *Taxter v. Safeco Ins. Co.*, 44 Wn. App. 124, 126, 721 P.2d 972 (1986). The Court should interpret RCW 48.18.290 in a manner that gives effect to that legislative intent. *Arborwood Idaho, L.L.C. v. City of Kennewick*, 151 Wn.2d 359, 367, 89 P.2d 217 (2004).

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C. PCIAA ignores the significant differences between certified mail and regular mail.

As the Ninth Circuit noted, courier delivery or Federal Express are “similar in form to certified mail.” *Order Certifying Question* at p.1521. When an insurer chooses to provide notice of cancellation to an insured by certified mail, the insurer directs the Post Office to deliver the notice only if someone is physically present to sign for it. When an insurer chooses to provide notice of cancellation by certified mail, the insurer restricts the Post Office’s ability to deliver the notice and therefore assumes the risk of non-delivery, as is the case when any other means of personal delivery is used to provide notice of cancellation.

PCIAA ignores the fact that certified mail is much less likely to be received by an insured than regular mail, as demonstrated by the history in this very case of repeated failures of certified mail to be delivered to the Kachmans. PCIAA argues that certified mail is superior to regular mail because certified mail allegedly increases “the recipient’s awareness of the notice by requiring acknowledgement of receipt.” *PCIAA Amicus Brief* at p.3. But certified mail’s requirement of receipt is precisely the problem with interpreting the statute such that certified mail is a form of “mailing” rather than a form of “delivery” – certified mail is only effective if it is personally delivered, with acknowledgement of receipt. The Court should

not ignore the significant differences between certified mail and regular mail in interpreting RCW 48.18.290.

The fact that some Washington statutes require the use of certified or registered mail is not evidence of “the legislature’s conclusion that certified mail is as good as – or superior to – regular mail as a means of providing notice,” as claimed by PCIAA. *PCIAA Amicus Brief* at p.9. It makes sense for the Legislature to require the use of certified or registered mail to provide various notices to *insurers*,¹ because insurers have offices staffed by employees to which mail carriers can deliver certified mail during regular business hours. Most *insureds*, however, are at work during the day when mail carriers make their rounds and will not be at home to receive certified mail. Nor will most insureds have an opportunity during their work day to drive to their local post office to retrieve certified mail.

Like Cornhusker, PCIAA asks this Court to write new language into the statute to authorize insurers to force insureds to go to a post office during business hours to retrieve a notice of cancellation:

RCW 48.18.290 . . . places the burden on the insured to see that mail is received (e.g., providing a current address to the insurer, providing a secure delivery location, and retrieving and reading mail).

¹ See, e.g., RCW 48.05.210(1), RCW 48.05.485; RCW 48.15.150(2), and RCW 48.43.355.

PCIAA Amicus Brief at p.12. There is nothing in RCW 48.18.290 that authorizes insurers to shift the burden of providing notice to insureds by requiring that insureds go to a post office during business hours to retrieve certified mail. The statute should not be interpreted in a way that imposes such an unauthorized burden on insureds.

D. PCIAA ignores insurers' obligation to give equal consideration in all matters to their insured's interests.

PCIAA represents insurance companies and should be well aware of insurers' obligation to "deal fairly and give 'equal consideration' in all matters to the insured's interests." *Van Noy v. State Farm*, 142 Wn.2d 784, 793, 16 P.3d 574 (2001). Instead, PCIAA argues for an interpretation of RCW 48.18.290 that would impose unauthorized burdens on insureds to go to a post office during business hours to retrieve certified mail. PCIAA ignores the fact that regular mail is far more likely than certified mail to provide notice of cancellation to insureds.

PCIAA advocates for certified mail because of the paper trail that it provides for insurers, not because of any advantage it provides to insureds: "Certified mail provides proof of the postmark date and, *if* it is received, confirmation of receipt." *PCIAA Amicus Brief* at p.3 (emphasis added). The paper trail created by certified mail might be helpful to

insurers to prove that a notice was mailed, but it is at the expense of assurance that the insured will receive the notice.

E. PCIAA's reliance on *Collins v. Lomas & Nettleton* is misplaced.

PCIAA relies heavily on *Collins v. Lomas & Nettleton Co.*, 29 Wn. App. 415, 628 P.2d 855 (1981). *PCIAA's Amicus Brief* at pp.4-7. For the reasons set forth in Appellant Samples' Reply Brief at pages 8-10, *Collins* is not persuasive authority on the issues in this case. The *Collins* court did not analyze the issues in this case. *Collins* was not an insurance case. The *Collins* court did not discuss the significant differences between certified mail and regular mail.

III. CONCLUSION

PCIAA argues that "[i]nsurers must be able to cancel an insurance policy with certainty when the policyholder has failed to pay the premium when due." *PCIAA Amicus Brief* at p.3. Insurers *can* cancel policies with certainty – by mailing notice to insureds by regular mail, or by personally delivering notice to insureds. If insurers choose to use a form of personal delivery to provide notice to insureds, then they must have evidence of actual delivery. If insurers mail notice by regular mail, then "[t]he affidavit of the individual making or supervising [the] mailing" is prima facie evidence of mailing under RCW 48.18.290(3). Appellant Samples'

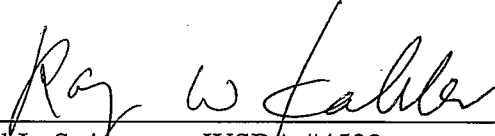
interpretation of the statute does not impose any undue burdens or obstacles on insurers for canceling insurance policies.

Unlike Cornhusker and PCIAA's interpretation of RCW 48.18.290, Appellant Samples' interpretation does not seek to add language to the statute that does not exist. Cornhusker and PCIAA seek to add language requiring insureds to go to a post office to retrieve notices of cancellation.

Unlike Cornhusker and PCIAA's interpretation of the statute, Appellant Samples' interpretation is consistent with the reality of the differences between certified mail and regular mail, and with the legislative purpose of providing insureds with notice of cancellation to give them an opportunity to pay the premium due to keep the existing policy in effect or obtain other insurance.

PCIAA asks this Court to ignore the significant differences between certified mail and regular mail, as well as the legislative intent underlying RCW 48.18.290. PCIAA asks this Court to interpret RCW 48.18.290 in a manner that places the interests of insurers above the interests of insureds, which is contrary to this Court's pronouncements on insurance law and the legislative intent underlying the statute. PCIAA's position should be rejected.

DATED this 2nd day of September, 2008



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CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2008, I served the following document(s):

(1) **Appellant Samples' Response to PCIAA's Amicus Brief**, on counsel below by the method(s) indicated and addressed as follows:

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Executed at Hoquiam, Washington this 2nd day of September, 2008.



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